Supreme Court, U.S.
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No. ——

IN THE

Supreme Court of the United States

PRODUCTION CREDIT ASSOCIATION OF EASTERN NEW MEXICO,
Petitioner,

v.

TAXATION AND REVENUE DEPARTMENT OF THE STATE OF NEW MEXICO,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of New Mexico

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does 12 U.S.C. § 2077 authorize states to tax the income of production credit associations, federally chartered instrumentalities of the United States?

CORPORATE DISCLOSURE STATEMENT AND PARTIES

All parties are identified in the caption to this Petition. Petitioner Production Credit Association of Eastern New Mexico has no parent corporation and no shareholders are publicly traded companies.

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PETITION FOR A WRIT OF CERTIORARI

Production Credit Association of Eastern New Mexico ("PCA") petitions for a writ of certiorari to review the judgment of the Court of Appeals of the State of New Mexico.

OPINIONS AND ORDERS BELOW

The opinion of the New Mexico Court of Appeals (Pet. App. 1a through 15a) is reported at 999 P.2d 1031 (N.M. Ct. App. 2000). Orders of the New Mexico Supreme Court denying PCA's petition for writ of certiorari (Pet. App. 40a) and denying the subsequent motion for rehearing (Pet. App. 41a) are not reported. The Decision and Order of the New Mexico Taxation and Revenue Department (Pet. App. 16a through 39a) is unpublished.

JURISDICTION

The judgment of the Court of Appeals of New Mexico was entered on February 1, 2000. The Supreme Court of New Mexico denied a timely petition for writ of certiorari to the Court of Appeals of New Mexico on March 13, 2000, and denied a timely motion for rehearing on May 1, 2000. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the United States Constitution, (art. VI, cl. 2) provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

12 U.S.C. § 2077 during the period at issue in this litigation provides:

> Each production credit association and its obligations are instrumentalities of the United States and as such any and all notes, debentures, and other obligations issued by such associations shall be exempt, both as to principal and interest, from all taxation (except surtaxes, estate, inheritance and gift taxes) now or hereafter imposed by the United States or any State, territorial or local taxing authority, except that interest on such obligations shall be subject to Federal Income taxation in the hands of the holder.

STATEMENT OF THE CASE

A. Introduction.

Petitioner PCA is a federally chartered production credit association, a component of the federal Farm Credit System created by Congress. This case is about whether PCA, an instrumentality of the United States, is immune from state taxation under the Supremacy Clause of the United States Constitution (art. VI, cl.2) or whether Congress waived that immunity through 12 U.S.C. § 2077. The New Mexico Court of Appeals correctly held that PCA is an instrumentality of the United States and that federal instrumentalities are inherently immune from state taxation under the Supremacy Clause unless Congress waives the immunity. However, the court went on to hold, incorrectly, that when Congress repealed an express statutory waiver of such immunity in 1985, it nonetheless intended to perpetuate the waiver without expressing that intention in statutory text or related legislative materials. Accordingly, the Court of Appeals held that PCA was not entitled to a refund of New Mexico franchise tax and corporate income taxes paid for the years 1992-1996.

This Court has granted certiorari to decide the materially identical question of whether the National Bank for Cooperatives, another federally chartered instrumentality of the United States that is a component of the Farm Credit System, is immune from state income taxation or Congress waived that immunity. *Director of Revenue v. CoBank, ACB*, No. 99-1972 (*cert. granted* June 26, 2000). This Petition should be held pending the Court's disposition of that case.

B. Federal Farm Credit System.

The Farm Credit System traces its origins to 1916 when Congress enacted the Federal Farm Loan Act, which created twelve regional Federal Land Banks. Pub. L. No. 64-158 (1916). The federal Farm Credit System was organized to

address the failure of commercial banks to meet the credit needs of farmers by providing secured credit at reasonable cost. *See* S. Rep. No. 64-144, at 2-3 (1916). Over the years, Congress amended and reorganized the Farm Credit System several times as agriculture and financial services have changed, the agricultural economy has ebbed and flowed, and flaws in prior versions in the Farm Credit System have surfaced.

During the Great Depression of the 1930's, Congress revamped the Farm Credit System to provide for, among other things, creation of production credit associations such as the one at issue in this appeal. *See*, Farm Credit Act of 1933, Pub. L. No. 73-75, 48 Stat. 257 (1933). Congress' purpose in modifying the Farm Credit System in the 1930's was to provide credit to the farmers and ranchers that commercial lenders either did not offer at all or did not offer on affordable terms.

Congress' reasons for continuing the Farm Credit System to the present day are essentially the same as those that led to its formation more than eighty years ago. As part of the 1971 modernization of the System in the Farm Credit Act of 1971, Pub. L. No. 92-181, 85 Stat. 583 (1971), Congress reiterated that the original reason for creation of the Farm Credit System was still paramount:

> It is declared to be the policy of the Congress, recognizing that a prosperous, productive agriculture is essential to a free nation and recognizing the growing need for credit in rural areas, that the farmer-owned cooperative Farm Credit System be designed to accomplish the objective of improving the income and well-being of American farmers and ranchers by furnishing sound, adequate, and constructive credit and closely related services to them, their cooperatives, and to selected farm-related businesses necessary for efficient farm operations . . .

Pub. L. No. 92-181, § 1.1, 85 Stat. 583 (1971), codified at 12 U.S.C. § 2001(a).

C. Production Credit Associations.

Congress created production credit associations, such as PCA, in the Farm Credit Act of 1933. *See* Pub. L. No. 73-75, § 20, 48 Stat. 257, 259 (1933). Congress structured production credit associations as limited purpose, federally chartered cooperative lending institutions designed to serve a function of crucial public importance: providing low interest loans to farmers and ranchers for farm and ranch purposes. At the time, Congress examined other methods of providing credit to farmers for farming operations (sometimes called "production credit"). Congress rejected commercial lending because such credit either was not available at all to farmers and ranchers or was available only at such ruinous rates that it would lead to a class of "perpetual debtors." S. Rep. No. 73-124, at 1-2 (1933); H.R. Rep. No. 73-171, at 1-2 (1933). Congress also rejected a centrally administered direct federal program as too expensive to operate, inefficient and insufficiently flexible for local needs. S. Rep. No. 73-124, at 1-2 (1933); H.R. Rep. 73-171, at 1-2 (1933). Instead, Congress created local production credit associations to provide credit locally on a safe business basis and at reasonable cost. S. Rep. No. 73-124, at 2 (1933); H.R. Rep. 73-171, at 2 (1933). The United States initially capitalized and owned all stock in production credit associations, including PCA, though Congress hoped that production credit association earnings could be used to retire stock held by the United States and that they would eventually become locally owned by their borrowers. S. Rep. No. 73-124, at 2 (1933).

The Farm Credit Act of 1933 stated that production credit associations are instrumentalities of the United States. Pub. L. No. 73-75; § 63, 48 Stat. 257, 267 (1933). Notwithstanding changes to the Farm Credit System over the years,

Congress continues to state that production credit associations are instrumentalities of the United States. The Farm Credit Act of 1971, Pub. L. No. 92-181, 85 Stat. 583 (1971), which substantially reorganized the Farm Credit System after production credit associations had become borrower-owned, stated in three places that production credit associations continue to be instrumentalities of the United States. *See*, 12 U.S.C. § 2071(a), 2071(b)(7), 2077.

As for state taxation of production credit associations, the initial 1933 legislation stated that production credit associations are federal instrumentalities and that "as such" their income was exempt from state taxation. Pub. L. No. 73-75, § 63, 48 Stat. 257, 167 (1933). The 1933 Legislation, however, expressly waived the production credit associations' Supremacy Clause immunity from state taxation once they retired stock owned by the United States that provided their initial capital. *Id.* By 1968, the United States ceased to own stock in production credit associations, triggering the conditional waiver of immunity provisions. The Farm Credit Act of 1971 comprehensively amended the statutes governing the Farm Credit System, but retained the waiver of immunity from state taxation contained in the Farm Credit Act of 1933. *See* Pub. Law No. 92-181, § 2.17, 85 Stat. 583, 602 (1971).

In 1985, Congress comprehensively restructured the Farm Credit System in response to the risk of insolvency created by loan defaults resulting from a widespread depression in the national farm economy. Farm Credit Amendments Act of 1985, Pub. L. No. 99-205, 99 Stat. 1678 (1985). Congress determined that the farm economy was in a depression as severe as that of the 1930's. H R. Rep. No. 99-425 (1985). At that time, half of all farmers had negative cash flow and could not meet operating or family living expenses from farm earnings. *Id.* Farm land values (i.e., potential loan collateral) had declined between 30% and 50% since 1981, with economists predicting a further 20% drop by 1987. *Id.*

Because the Farm Credit System was a single industry lender holding about 32% of all farm debt in America, it was under tremendous financial stress. *Id.* In short, Congress perceived a very real threat of a total collapse of the Farm Credit System and the farm economy unless it took drastic steps to shore up its access to capital and financial condition. *Id.* Among other things, Congress provided for an infusion of federal financial assistance into the Farm Credit System. Pub. L. No. 99-205, § 103, 99 Stat. 1678, 1686 (1985) (adding § 4.28J). As part of the 1985 restructuring, Congress also amended 12 U.S.C. § 2077 to repeal the conditional waiver of tax immunity for production credit associations that had been in the Farm Credit Act of 1933 and the Farm Credit Act of 1971. Farm Credit Amendments Act of 1985, Pub. L. No. 99-205, § 205(d)(16), 99 Stat. 1678, 1705 (1985).

D. Production Credit Association of Eastern New Mexico.

The federal Farm Credit Administration authorized incorporation of PCA as a federal production credit association pursuant to the Farm Credit Act of 1933. The Farm Credit Administration issued it a Farm Credit Administration preprinted set of Articles of Incorporation, dated February 15, 1934. PCA has its principal place of business in Clovis, New Mexico. Pursuant to a "Certificate of District To Be Served," the Farm Credit Administration limited PCA to lending to farmers and ranchers in Quay, Curry, DeBaca, Guadalupe and Roosevelt Counties in New Mexico. The stated corporate purpose for PCA was and is solely to exercise powers granted to it by Congress under the Farm Credit Act of 1933 as it existed or may be amended. PCA lends money for periods of ten years or less. Pursuant to statute, PCA does not lend to the general public, but only to qualified ranchers or farmers. *See*, 12 U.S.C. § 2071.

E. Proceedings Below and Preservation of Federal Question.

At every stage of this dispute, PCA has raised the central issue here: whether the Supremacy Clause bars imposition of New Mexico's corporate income tax and franchise tax on production credit associations because of their status as federally chartered instrumentalities of the United States.

During the years 1992-1996 PCA timely paid New Mexico corporate income and franchise taxes. PCA later timely claimed refunds from the Taxation and Revenue Department of New Mexico (the "Department") for these taxes paid for the years 1992 through 1996. The ground for the claims for refund was that PCA, an instrumentality of the United States, paid taxes it did not owe because it was immune from state taxation under the Supremacy Clause of the United States Constitution, art. VI, cl. 2. *See* Taxation and Revenue Department Decision and Order, No. 98-58. Pet. App. 17a. The Department denied PCA's claims for refund. *Id.* at 17a.

PCA timely filed administrative protests with the Department contesting denial of the claims for refund on the same ground stated in the claims for refund—immunity from state taxation under the Supremacy Clause. *Id.* at 17a. In response to an argument presented by the Department, PCA stated that the 1985 repeal of the express waiver of immunity restored its inherent immunity from state taxation provided by the Supremacy Clause. *Id.* at 33a, 35a.

The Department's internal Hearing Officer decided the consolidated protests upon stipulated facts and denied them on December 21, 1998, in Decision and Order No. 98-58. *Id.* at 16a through 39a. The Hearing Officer acknowledged that because PCA is a federal instrumentality it was immune from state taxation unless Congress has waived that immunity. *Id.* at 33a. The Hearing Officer incorrectly concluded, however, that Congress had tacitly waived that immunity despite its

repeal of the only statutory language granting such a waiver. *Id.* at 33a through 37a. In the Hearing Officer's view, Congress's 1985 repeal of the waiver language should not be understood to "confer an implied immunity from state income taxes" upon production credit associations. *Id.* at 38a.

In a timely appeal to the New Mexico Court of Appeals, PCA argued that the Department should have granted its claims for refund on the ground that the Supremacy Clause rendered it immune from state taxation and that there was no statute waiving that immunity for the tax reporting periods at issue. Court of Appeals Opinion, Pet. App. 1a. through 15a. PCA contended among other things, that the statutory provisions spoke for themselves in providing no waiver of immunity; that Constitutional protections cannot be removed by implication as the Hearing Officer concluded; and, the Hearing Officer was wrong in assuming that an instrumentality of the United States is immune from state taxation only if Congress had affirmatively conferred such immunity. Appellant's Brief in Chief at 15-19, *Production Credit Ass'n of Eastern New Mexico v. Taxation and Revenue Dept.*, 999 P.2d 1031 (N.M. Ct. App. 2000) (No. 20,078).

The New Mexico Court of Appeals affirmed. *Id.* at 15a. The Court of Appeals acknowledged that PCA is a federal instrumentality entitled to Supremacy Clause immunity from state taxation unless Congress waived that immunity. *Id.* at 6a through 7a. However, the court held that when Congress repealed the waiver of state tax immunity in 1985 it did not intend to confer such immunity upon production credit associations. *Id.* at 13a. The Court of Appeals based its conclusion upon Congress' failure to state a reason for the repeal in its legislative history. *Id.* at 12a. Though aware that other jurisdictions had examined the same statutory text and history and held that production credit associations and similar Farm Credit System entities were immune from state

taxation, the Court of Appeals rejected those decisions as "logical but incorrect." *Id.* at 14a.

PCA filed a timely petition for writ of certiorari (discretionary review) in the New Mexico Supreme Court on the issues of: 1) "[w]hether imposition of the New Mexico corporate income tax and franchise tax upon PCA, a federal instrumentality, violates the Supremacy Clause of the United States Constitution, art. VI, cl.2.", 2) "whether Congress authorized the State of New Mexico to impose its corporate income tax and franchise tax upon production credit associations"; and, 3) "whether the Court of Appeals erred by inferring a waiver of constitutional immunity of PCA from state taxation." Petition for Writ of Certiorari to the Court of Appeals at 2, *Production Credit Ass'n of Eastern New Mexico v. Taxation and Revenue Dept.* (N.M., 2000) (No. 26211).

The New Mexico Supreme Court denied PCA's petition in an order dated March 13, 2000. Pet. App. 40a. PCA timely filed a Motion for Rehearing. Motion for Rehearing On Denial of Petition for Writ of Certiorari to the Court of Appeals. *Production Credit Ass'n of Eastern New Mexico v. Taxation and Revenue Dept.* (N.M. 2000) (No. 26211). The New Mexico Supreme Court *sua sponte* extended the period provided for in its rules to consider PCA's Motion for Rehearing, but subsequently denied it in an order filed May 1, 2000. Pet. App. 41a.

REASONS FOR GRANTING THE WRIT

The New Mexico Court of Appeals' determination that Congress silently waived production credit association Supremacy Clause immunity from state taxation in 1985 has serious negative implications for not only the financial condition of production credit associations but also the farm and ranch borrowers who rely on them to provide affordable farm credit. If the New Mexico Court of Appeals is correct, the decision presents a particularly grave problem for

production credit associations and other Farm Credit System entities that may face very large retroactive tax liabilities arising out of their understanding that, as federal instrumentalities, they were immune from state taxation after the Farm Credit Amendments Act of 1985.

The New Mexico Court of Appeals' decision is directly contrary to this Court's longstanding Supremacy Clause jurisprudence. In *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), the Court established that the Supremacy Clause provides instrumentalities of the United States immunity from state taxation (and other types of state regulation) and that any attempt to impose such taxes upon them is void:

> The great principle is, that the constitution and laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective states, and cannot be controlled by them . . .
>
> We find then . . . a total failure of this [state alleged] original right to tax the means employed by the government of the Union, for the execution of its powers . . .
>
> [T]he states have no power, by taxation or otherwise, to retard, impede, burden, or in any other manner control the operations of the constitutional laws enacted by the Congress to carry into execution the powers vested in the general government . . .
>
> Such a tax must be unconstitutional.

17 U.S. at 426, 430, 435. In the 180 years since the *McCulloch* decision, this Court has held over and over that states may not impose taxes upon "instrumentalities" of the United States because the Supremacy Clause provides an implied immunity. In *Osborn v. The Bank of The United States*, 22 U.S. (9 Wheat.) 738, 865 (1824), the Court held that Supremacy Clause immunity from state taxation is

implied and congressional silence as to immunity did not mean that a federal instrumentality lacked immunity. *Accord, Mayo v. U.S.*, 319 U.S. 441, 445-446 (1943) (rejecting contention that statute is required to confer Supremacy Clause immunity). Numerous cases to the present have held that the Supremacy Clause provides federal instrumentalities implied immunity from state taxation. *See, e.g., United States v. State Tax Comm'n*, 421 U.S. 599, 605 (1975) (state could not impose tax upon sales to military base); *First Agric. Nat. Bank v. State Tax Comm'n*, 392 U.S. 339, 340 (1968) (federally chartered national banks only subject to state sales and use taxes to extent expressly permitted by Congress); *Department of Employment v. United States*, 385 U.S. 355, 358-359 (1966) (federally chartered, supervised and audited Red Cross not subject to state unemployment compensation tax despite the fact that it is not a government agency). Congress is presumed to have been aware of this Supremacy Clause jurisprudence when it enacted the 1985 amendments to Farm Credit System legislation. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 351 (1998).

The New Mexico Court of Appeals' decision violates the well-established rule that Congress may waive Supremacy Clause protections only with express statutory language. *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 180 (1988) (Congress must provide "clear and unambiguous" authorization for state regulation of federal facilities). *See also, United States v. United Mine Workers*, 330 U.S. 258, 272 (1947) (statutes divesting existing rights or privileges cannot be applied to the United States without express language); *Farm Credit Servs. of Central Arkansas, v. Arkansas*, 76 F.3d 961, 964 (8th Circuit 1996) (express language required to waive immunity of production credit associations), *rev'd on other grounds*, 520 U.S. 821 (1997). Thus, the New Mexico Court of Appeals got it backwards when it held that 1) Congress must grant Supremacy Clause

immunity by statute and, 2) a waiver of that immunity may be implied when the governing statutes are silent.

The decision of the New Mexico Court of Appeals conflicts with the decisions of all other reported state court decisions to consider the effect of the 1985 Farm Credit Amendments Act repeal of express waivers of state tax immunity upon Farm Credit System entities. *Production Credit Ass'n of Southeastern Missouri v. Director of Revenue*, 10 S.W.3d 142 (Mo.2000) (production credit associations and CoBank immune from state taxation), *cert. granted* June 26, 2000; *Arkansas v. Arkansas Farm Credit Servs.*, 994 S.W.2d 453 (Ark. 1999) (production credit associations immune), *cert. denied*, 120 S.Ct. 1530 (2000); *Farm Credit Servs. Of Mid-America v. Department of State Revenue*, 705 N.E. 2d 1089 (Ind. Tax. Ct. 1999) (federally chartered agricultural credit association immune; state argument for implicit waiver and requirement of express statutory constitutional immunity turns Supremacy Clause jurisprudence on its head), *review denied*, Dkt. No. 49S20-9908-TA (Ind. 1999); *Northwest Louisiana Prod. Credit Ass'n v. State*, 746 So.2d 280 (La. Ct. App. 1999) (production credit associations immune); *See also*, *Farm Credit Servs. of Cent. Ark. v. Arkansas*, 76 F.3d 961, 964 (8th Cir. 1996) (production credit associations immune from state taxation), *rev'd on other grounds*, 520 U.S. 821 (1997). In addition, at least two state tax tribunals have held that production credit associations are immune from state taxation. *Appeal of Farm Credit Servs. of Central Kansas*, Dkt. Nos. 1998-2839-DT through 1998-2845-DT (Kan. Bd. Tax. App. 1999); *Utah Prod. Credit Ass'n v. Auditing Div.* App. Nos. 97-0425 and 99-015 (Utah State Tax Comm'n 1999).

Finally, the issue presented by this Petition is not distinguishable in any material way from the issue presented in a case in which the Court recently granted review. On June 26, 2000, the Court granted the Missouri Director of

Revenue's petition for writ of certiorari in *Dir. Of Revenue v. CoBank ACB*, No. 99-1792, in the context of another Farm Credit System institution, CoBank, formerly the National Bank for Cooperatives.

Congress created the National Bank for Cooperatives, just as it created production credit associations, as "a federally chartered instrumentality of the United States and an institution of the Farm Credit System." Agricultural Credit Act of 1987, Pub. L. No. 100-233, § 415, 101 Stat. 1568, 1642 (1988), codified at 12 U.S.C. § 2141(a). *Compare* 12 U.S.C. § 2071(a) (production credit associations). CoBank claimed, just as PCA did below, that it was immune from state taxation under the Supremacy Clause and that Missouri could not lawfully subject it to the State's corporate income tax. The Missouri Director of Revenue, just like the Department in New Mexico, countered that the 1985 amendments to 12 U.S.C. § 2134, which repealed a previous waiver of tax immunity that had been in place for years in which the Governor of the Farm Credit Administration held stock in the banks for cooperatives such as CoBank, was not intended to eliminate the waiver of immunity but rather should be understood as an inconsequential technical change with no substantive effect on the State's freedom to tax. The language and statutory history of 12 U.S.C. § 2134 is nearly identical to 12 U.S.C. § 2077, the provision at issue here. Both once contained conditional express waivers of Supremacy Clause immunity from state taxation. In 1985, as part of the same legislation to reorganize the Farm Credit System, Pub. L. 99-205, 99 Stat. 1678 (1985), Congress repealed the waiver of Supremacy Clause immunity from state taxation for both 12 U.S.C. § 2077 and 12 U.S.C. § 2134. Pub. L. No. 99-205, §§ 205(d)(16) and 205(e)(10), 99 Stat. 1678, 1705 (1985). For the period at issue, Section 2134, after the 1985 repeal of the waiver of immunity, is nearly identical to 12 U.S.C. § 2077:

> Each bank for cooperatives and its obligations are instrumentalities of the United States and as such any and all notes, debentures and other obligations issued by such bank shall be exempt, both as to principal and interest from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States or any State, territorial, or local taxing authority, except that interest on such obligations shall be subject to Federal income taxation in the hands of the holder.

The Missouri Supreme Court rejected the Director of Revenue's argument based on the history of 12 U.S.C. § 2134 and held that CoBank was immune from Missouri taxation under the Supremacy Clause.

Missouri's petition for certiorari presented the same question under Section 2134 that this case presents under Section 2077, and relied heavily on the theory that the Missouri Supreme Court's decision was in conflict with the New Mexico Court of Appeals' decision on essentially the same issue. Petition for Writ of Certiorari at 5, 7, 12, 14-15 and Pet. App. A-17 through A-32, *Director of Revenue v. CoBank ACB* (No. 99-1792).

The Court granted the petition in the Missouri case and restated the question presented as follows: "Does 12 U.S.C. Section 2134 authorize states to tax the income of the National Bank for Cooperatives, a federally chartered instrumentality of the United States?" Neither the issue presented in this Petition, nor the grounds therefor, differ in any material way from the CoBank case that this Court has already agreed to review.

CONCLUSION

The Court should hold this Petition pending its decision in *Director of Revenue v. CoBank ACB* and then act upon it in accordance with that decision.

Respectfully submitted,

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